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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CONNECTICUT BANK AND TRUST COMPANY, NATIONAL ASSOCIATION, *ET AL.*,

Petitioners,

—versus—

WILMINGTON TRUST COMPANY, AND UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Can the election provided by Rule 9(h), Fed. R. Civ. P., to "the pleader of a claim" deprive another party of its constitutional right to a jury trial of a properly joined counterclaim cognizable "at law".

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Respondents Wilmington Trust Company (hereinafter "Wilmington Trust")[1] and the International Organization of Masters, Mates and Pilots (hereinafter "MM&P")[2] submit this brief in opposition to the petition for certiorari filed by Connecticut Bank and Trust Company, National Association (hereinafter "Connecticut Bank"). Connecticut Bank seeks review of an order of the United States Court of Appeals for the Ninth Circuit holding that the MM&P's constitutional right to a jury trial of its non-maritime counterclaims against Connecticut Bank, Wartsila Marine Industries, Inc. (hereinafter "Wartsila Marine"), and Oy Wartsila Ab (hereinafter "Oy Wartsila") may not be abridged by Connecticut Bank's election to have its separate claims tried "in admiralty".

STATEMENT OF THE CASE

Connecticut Bank brought this action against the S.S. Monterey and her owners on behalf of Wartsila Marine, a subsidiary of Oy Wartsila, to foreclose a preferred ship mortgage on the vessel. Following the

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[1] Wilmington Trust Company is a wholly owned subsidiary of Wilmington Trust Corporation. All of the subsidiaries of Wilmington Trust Company are wholly owned.

[2] The MM&P is an unincorporated U.S. labor organization.

vessel's arrest, Wilmington Trust, as trustee for the MM&P, filed a claim pursuant to Supplemental Admiralty Rule C(6) to assert its interest in the vessel as mortgage holder. Thereafter, the MM&P filed a claim in its own name. In addition to the filing of the claims, Wilmington Trust and the MM&P answered Connecticut Bank's complaint, as required by the Supplemental Rules for Certain Admiralty and Maritime Claims, and asserted certain counterclaims against Connecticut Bank, Wartsila Marine and Oy Wartsila.[3] Following the filing of their claims, answer and counterclaims, Wilmington Trust and the MM&P filed a complaint in intervention as required by the Local Rules of Practice for the United States District Court for the District of Hawaii.

The MM&P's counterclaims stated claims for relief under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (1984) ("RICO"), the Employees Retirement Income Security Act, 29 U.S.C. §§ 1140-1141 (1985) ("ERISA") and the common

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[3] By filing a claim, the claimant has the right to file an answer and defend on the merits. 7A J. Moore, *Moore's Federal Practice*, ¶ C.16 at 700.15 (2d ed. 1988). As claimants in an *in rem* proceeding, Wilmington Trust and the MM&P assumed the posture of defendants. *The Two Marys*, 12 Fed. 152 (S.D.N.Y. 1882) ("A 'claimant' in the admiralty practice ... is a person who assumes the position of a defendant and demands the redelivery to himself of the vessel arrested").

law of fraud and tortious interference with contract.[4] The counterclaims are based upon certain material misrepresentations by Oy Wartsila and Wartsila Marine that induced the MM&P to sell the vessel and take back a second mortgage on the vessel subordinate to the mortgage held by Wartsila Marine.

Connecticut Bank challenged the propriety of the assertion of the MM&P's claims in the District Court, and the District Court ruled that the MM&P's claims were properly joined. As an unreviewable interlocutory decision, that decision was not before the Ninth Circuit and is not now before the Court.

Although it was undisputed below that the MM&P's counterclaims, standing by themselves, carry the Seventh Amendment right to a jury trial, the District Court struck the MM&P's jury trial demand for "the reasons set forth in the memoranda of [Connecticut Bank]".

In its memoranda, Connecticut Bank argued that the MM&P's non-maritime claims were not triable to the

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[4] On May 17, 1991, following the Ninth Circuit's issuance of its writ of mandamus, the District Court dismissed the MM&P's ERISA, RICO and tortious interference counterclaims. As an interlocutory decision, the MM&P was not entitled to appeal the District Court's decision, and the Ninth Circuit has not, therefore, had an opportunity to review the dismissal of these claims.

The District Court denied Connecticut Bank's motion to dismiss the MM&P's common law fraud and equitable subordination counterclaims. Trial of these counterclaims is scheduled to commence on July 6, 1992.

jury because Connecticut Bank's claim to foreclose its ship mortgage is maritime. According to Connecticut Bank, when a plaintiff asserts a maritime claim as to which there is no right to trial by jury, Rule 9(h), Fed. R. Civ. P., prohibits a jury trial of all other claims in the action, regardless of another party's constitutional right to trial by jury.

On the MM&P's petition for a writ of mandamus, the Ninth Circuit rejected Connecticut Bank's argument and held that Rule 9(h) does not prohibit a jury trial of a non-maritime claim, otherwise triable to the jury as a matter of right, simply because another party's claim lies exclusively in admiralty or because another party has elected, pursuant to Rule 9(h), to treat one of its claims as a "maritime claim".

By decision dated November 4, 1991, the Ninth Circuit declined to rehear the matter *en banc*. As set forth below, the Ninth Circuit's decision is correct and does not merit further review.

SUMMARY OF ARGUMENT

Certiorari is sought on the grounds that the Ninth Circuit's decision "emasculates" a plaintiff's alleged "right" to a non-jury trial of a maritime claim, that it is based on a misinterpretation of this Court's decisions and that it is in conflict with the decisions of the Fifth Circuit. As set

forth below, none of Connecticut Bank's arguments holds water. The decision of the Ninth Circuit is not in conflict with the decision of another court of appeals, is mandated by the decisions of this Court, and does not interfere with any recognizable right belonging to Connecticut Bank. In short, the Ninth Circuit's decision does not merit review by this Court.

REASONS FOR DENYING THE PETITION

I.

THE NINTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH, IF NOT REQUIRED BY, THE CONSTITUTION, THE FEDERAL RULES AND CONTROLLING PRECEDENT.

(A) The Ninth Circuit's Decision Preserves The MM&P's Constitutional Right To A Jury Trial.

Following this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), the Ninth Circuit held that one party's election to proceed in admiralty without a jury on its claim does not deprive another party of a jury trial, as provided by the Constitution, or the Saving-to-Suitors Clause, 28 U.S.C. § 1333(1) (1966), on the latter's properly joined non-maritime claims.

Moreover, to the extent that the claims that are triable to the jury as a matter of right are "factually related" to a maritime claim, as to which there is no right to trial by jury, the Ninth Circuit's decision properly recognizes that under the Court's decision in *Beacon Theatres*, all of the factually related claims must be submitted to the jury.

In *Beacon Theatres*, the Court held that a party's enjoyment of the constitutional right to trial by jury does not turn on whether the party won the "race to the courthouse". 359 U.S. at 504. The Court there stated that "if [the defendant] would have been entitled to a jury trial in a suit against [the plaintiff] it cannot be deprived of that right merely because [the plaintiff] took advantage of the availability of declaratory relief to sue [the defendant] first". The Court admonished that "only under the most imperative circumstances ... can the right to a jury trial of legal issues be lost through prior determination" of other claims. 359 U.S. at 510-511.

Plainly, the Ninth Circuit's decision in this case, that a jury trial of legal claims is not lost when such claims are asserted in a civil action in which maritime claims have been interposed, preserves the MM&P's constitutional right to a jury trial, as required by *Beacon Theatres*.

(B) The MM&P's Counterclaims Are Not "In Admiralty".

Although Connecticut Bank argues that the MM&P's counterclaims are not triable to the jury as a matter of right because they are "in admiralty", the premise of its argument, that the MM&P's counterclaims are "in admiralty", is false. The MM&P's counterclaims, based on ERISA, RICO, tortious interference with contract and common law fraud, arise "at law" and do not involve the application of maritime law.

That the MM&P's counterclaims were asserted in a civil action in which another party has asserted maritime claims does not deprive the counterclaims of their "legal" character, nor the MM&P of its Seventh Amendment right to a jury trial. 9 Wright and Miller, *Federal Practice and Procedure*, Civil § 2315 at 76 & n.72 (1971); *Cf.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989), *quoting*, *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) ("[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity").

Indeed, the Federal Rules expressly contemplate the assertion of maritime and non-maritime claims in one action, a joinder not possible prior to unification. Rule 18 expressly provides that:

> A party asserting a claim to relief as [a] ... counterclaim ... may join, either as independent or as alternate claims, as

> many claims, *legal*, equitable, or maritime, as the party has against an opposing party.

Fed. R. Civ. P., Rule 18(a) (emphasis added).

Given that the MM&P has brought its claims against Connecticut Bank "at law", the MM&P's claims against Connecticut Bank are triable to a jury as a matter of right. Indeed, the Federal Rules expressly preserve the MM&P's right to a jury trial of its claims. Thus, Rule 38(a) states:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

A leading commentator's analysis of the operation of the Federal Rules likewise supports the MM&P's demand for trial by jury as to those claims which the MM&P has brought "at law":

> Just as the merger of law and equity permits joinder of claims of each kind, with the legal claims tried to the jury and the equitable claims to the court, so too the merger of civil and admiralty procedure was intended to permit joinder in one suit of claims historically of a maritime nature with those formerly triable in a civil action. *Though the merger does not expand the right to jury trial of the maritime claim, it does not prevent jury trial of the non-maritime claim.*

9 Wright and Miller, *supra*, Civil § 2315 at 76, n. 72 (emphasis added).

Thus, contrary to Connecticut Bank's assertions, the MM&P's claims are not "in admiralty". Indeed, with

the Court's adoption of the unified Federal Rules in 1966, the "admiralty side of the Court" was abolished. Since the unification, there has been but "one form of action ... known as 'civil action'". Fed. R. Civ. P., Rule 2. The advisory committee notes to the Federal Rules explain the significance of this change:

> This is the fundamental change necessary to effect unification of the civil and admiralty procedure. Just as the 1938 Rules abolished the distinction between actions at law and suits in equity, *this change would abolish the distinction between civil actions and suits in admiralty*.

Fed. R. Civ. P. 1, advisory committee notes, at 18 (West 1991) (emphasis added).

The leading admiralty treatise is to the same effect:

> Until 1966, each Federal District Court had an admiralty "side" with a separate docket and rules of procedure peculiar to admiralty cases. In 1966, the separate "sides" were merged, the admiralty "suit" became a regular "civil action", and the Federal Rules of Civil Procedure were made generally applicable, with some special rules for certain cases heard under the "admiralty" jurisdictional grant.

Gilmore and Black, *The Law of Admiralty*, § 1-1 at 2 (1975).

Plainly, the references in Connecticut Bank's brief to this case being one "in admiralty" are mistaken. There

are no longer cases "in admiralty", as Gilmore and Black observe:

> It must steadily be borne in mind, however, that no case is any longer "in admiralty", in the older sense; the admiralty clause in Article III of the Constitution, and the successive statutory implementations, are *grounds for jurisdiction* in ordinary civil actions, with some modification in procedural treatment when these grounds are with warrant invoked.

Gilmore and Black, *supra*, § 1-9 at 20.

Given that the MM&P's claims arise at law, its claims are triable to the jury as a matter of right, as the Ninth Circuit held.

(C) The Ninth Circuit Has Not "Emasculated" Rule 9(h).

Contrary to Connecticut Bank's assertion, the Ninth Circuit's decision does not emasculate Rule 9(h), Fed. R. Civ. P. The Ninth Circuit properly rejected Connecticut Bank's assertion that one party's Rule 9(h) election to proceed in admiralty on its claims attaches to non-maritime claims by other parties.

Rule 9(h) is claim specific. By the terms of the Rule, a party's Rule 9(h) designation applies solely to specifically identified claims within the party's pleading, not to the entire "civil action". Thus, Rule 9(h) provides in pertinent part:

> A pleading or count setting forth *a claim* for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying *the claim* as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Fed. R. Civ. P., Rule 9(h) (emphasis added).

Plainly, Rule 9(h) speaks in terms of a "claim", not an "action". Contrary to Connecticut Bank's assertion, Rule 9(h) does not operate to transform every claim in a civil action into a "maritime claim". By the terms of Rule 9(h), the consequences of a Rule 9(h) election attach only to those claims which the "pleader" has identified as "maritime claims" or which are cognizable solely in admiralty.

To be sure, a pleader may, under certain circumstances, invoke Rule 9(h) to preclude a jury trial of the claim set forth in his pleading. But Connecticut Bank's contention that such an election precludes a jury trial of all claims, including claims by other parties, confuses one party's election to have its claims tried in admiralty without a jury with another party's constitutional right to have its independent claims tried at law with a jury, a right that Rule 38 of the Federal Rules expressly preserves.

As the Ninth Circuit recognized in a prior decision, where such a conflict arises, one party's Rule 9(h) election to proceed in admiralty without a jury must give way to the other party's constitutional right to a jury trial. *Owens-Illinois*, *supra*, 698 F.2d at 972 & n.2. This is the rule in the Eighth Circuit as well. *See*, *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1042 (8th Cir. 1983) ("interest of preserving constitutional rights" necessitated jury trial of counterclaims for breach of contract and fraud notwithstanding plaintiff's Rule 9(h) election with respect to his *in rem* claim).

Thus, the issue here is not whether a pleader may make a Rule 9(h) election with respect to the claims set forth in its complaint, but whether the pleader may additionally elect to have the non-maritime claims set forth, not in its pleading, but in the pleadings of other parties, treated as "maritime claims" to thereby deny such parties of their constitutional right to trial by jury. Following this Court's decisions, the Ninth Circuit correctly held that a pleader may not.

(D) There Is No "Right" To A Non-Jury Trial Of A Maritime Claim.

Connecticut Bank's assertion that the Ninth Circuit's decision will permit any party to "nullify" another party's "right" to proceed in admiralty without a

jury trial is flawed. Its premise, that a party has a "right" to a non-jury trial of a maritime claim, is faulty. There is no right to a non-jury trial. The Court settled that issue long ago. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, *reh'g denied*, 375 U.S. 870 (1963); *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 510 ("the right to jury trial is a constitutional one ... no similar right protects trials by the Court"); *see also*, *Owens-Illinois, Inc. v. U.S. District Court for the Western District*, 698 F.2d 967, 972 (9th Cir. 1983) ("there is ... no absolute ban on trial [by jury in admiralty cases]").

Thus, while Connecticut Bank complains bitterly that the Ninth Circuit's decision "undermines", "emasculates" and "undercuts" what it perceives as a right to a non-jury trial, the fact is, no decision of the Court has found such a right.

By contrast, the Seventh Amendment to the Constitution guarantees to the MM&P the right to trial by jury of claims at law. 9 Wright and Miller, *supra*, Civil § 2317. Given that the MM&P has brought its claims against Connecticut Bank "at law", the MM&P's claims are triable to a jury as a matter of right.

(E) Petitioners Misapprehend The Issue Before The Court.

Plainly, Connecticut Bank misapprehends the issue in this case. Contrary to the assertion in Connecticut Bank's petition, the issue resolved by the Ninth Circuit is not whether there is a right to a jury trial in an "admiralty case", but whether the right to a jury trial of a claim at law is somehow lost when that claim is joined in a civil action in which "maritime claims" have been asserted.

It is undisputed that a maritime claim is not a "common law" claim for purposes of the Seventh Amendment. Because the MM&P's counterclaim is at law, however, the Ninth Circuit held that the MM&P has a constitutional right to a jury trial of that counterclaim. That decision is correct. Plainly, a maritime claimant's preference for a bench trial cannot "trump" a civil claimant's constitutional right to a jury trial.

Nowhere does Connecticut Bank explain why the MM&P should be denied a jury trial of its non-maritime counterclaims, counterclaims based upon ERISA, RICO, tortious interference with contract and common law fraud, because it was required and/or permitted by Rule 13 to assert those counterclaims in an action in which a maritime claim has been asserted by another party. Nothing in the Federal Rules requires a defendant to waive a jury trial of legal counterclaims because the civil

and admiralty rules were merged and now permit the assertion of maritime and non-maritime claims in one action.

To assert, as Connecticut Bank does, that there is no right to a jury trial "in admiralty" is to beg the question: are the MM&P's ERISA, RICO, tortious interference with contract and common law fraud counterclaims "in admiralty". The Ninth Circuit held that the MM&P, as the pleader of those claims, could elect, pursuant to Rule 9(h), to bring the claims "at law". Connecticut Bank offers no explanation as to why it believes the election provided by Rule 9(h) is not available to the "pleader" of a counterclaim, as to why the MM&P's counterclaim is not "at law", or as to why, if the merger of law and admiralty was not intended to affect a party's right to jury trial, Rule 9(h) should be construed as prohibiting jury trial of a civil claim that, prior to merger, would most certainly have been triable to the jury as a matter of right.

Indeed, Connecticut Bank concedes that if the MM&P's counterclaims were pleaded in a complaint in a separate action, the Seventh Amendment would entitle the MM&P to a jury trial. Surely, the MM&P 's constitutional rights are not defeated by the fact that the Federal Rules permit the MM&P to assert its claims in a civil action in which maritime claims have been interposed. Plainly, the constitutional right to trial by

jury does not depend upon whether a claim is asserted with other claims in one action, or separately.

Although Connecticut Bank complains that as a result of the Ninth Circuit's decision "nearly every maritime claim will be heard by a jury", it is clear that the Ninth Circuit's decision in this case will not require a jury trial of a maritime claim unless that claim is "factually related" to a non-maritime claim by another party as to which the Seventh Amendment guarantees the right to trial by jury. In that limited circumstance, and only in that limited circumstance, is a jury trial required. Moreover, even if certain courts were to "be confronted with a greater number of costly and time-consuming jury trials", as Connecticut Bank asserts, such "considerations are insufficient to overcome the clear command of the Seventh Amendment". *Granfinanciera, S.A. v. Nordberg, supra*, 492 U.S. at 63.

Contrary to Connecticut Bank's assertion, the Ninth Circuit's decision does not "ignore long-standing admiralty rights and traditions", but recognizes a principle that the Court has recognized since *Beacon Theatres*, that a party's constitutional right to a jury trial is not lost simply because that party was permitted to assert, or was required to assert, a legal claim in an action involving equitable or maritime claims. Since *Beacon Theatres*, the Court has made it clear that a party's right to a jury trial is not conditioned upon the

party's winning the race to the courthouse. *Beacon Theatres, Inc. v. Westover*, *supra*, 359 U.S. at 504.

Although Connecticut Bank argues that "admiralty is unique", and that admiralty has recognized that "judges, rather than juries, are the best fact-finders of complicated" maritime matters, Connecticut Bank has not cited any case in which this Court, or any other for that matter, has held that the Constitution and the Federal Rules do not apply to maritime claims, or that they do not apply to "complicated cases". While admiralty may be "centuries old", the Federal Rules of Civil Procedure are fully applicable to cases involving maritime claims. *See, Farbwerke Hoeschst, A.G. v. M/V "Don Nicky"*, 589 F.2d 795, 797 (5th Cir. 1979) ("the District Court ... accepted plaintiffs' argument that defendants' defense ... doesn't go in admiralty. We disagree. The Federal Rules of Civil Procedure are fully applicable in admiralty cases"). Given that the Federal Rules expressly "preserve the right to jury trial inviolate", the Ninth Circuit properly held that the MM&P is entitled to a jury trial of its legal counterclaims.

(F) The Ninth Circuit Has Not Misinterpreted The Court's *Fitzgerald* Decision.

According to Connecticut Bank, the Ninth Circuit's reading of *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963), is incorrect. Connecticut Bank asserts that since the plaintiff in *Fitzgerald* demanded a jury trial of his Jones Act claim, the Jones Act claim was tried on the "civil side" of the Court, not on the admiralty side of the Court, and that, therefore, the Ninth Circuit's reliance on *Fitzgerald* is misplaced.

To be sure, a Jones Act claim tried to a jury is deemed to be a claim "at law", rather than a claim "in admiralty". Insofar as this case is concerned, however, this is a distinction without a difference. The maintenance and cure claim in *Fitzgerald* was "cognizable solely in admiralty", 934 F.2d at 1030. Notwithstanding this fact, the Court held in *Fitzgerald* that the plaintiff's admiralty claim could be tried to a jury. The Court rejected the argument advanced by the defendant in *Fitzgerald* that there was a "right" to a non-jury trial of a maritime claim. Thus, the proposition for which *Fitzgerald* is cited by the Ninth Circuit, that there is no "right" to a non-jury trial of a maritime claim, is plainly correct.

Indeed, nowhere does Connecticut Bank take issue with the fact that the Court in *Fitzgerald* permitted

a maintenance and cure claim, cognizable solely in admiralty, to be tried to a jury. Plainly, if there were a right to a non-jury trial of a maritime claim, the Court could not have permitted the maintenance and cure claim in *Fitzgerald* to be tried to the jury.

It is the Connecticut Bank, not the Ninth Circuit, that misreads *Fitzgerald*.

(G) The Ninth Circuit's Decision Is In Accord With Ninth Circuit Precedent.

Contrary to Connecticut Bank's assertion, the Ninth Circuit's decision is fully consistent with, if not required by, its own prior decisions. *See*, *Owens-Illinois, Inc. v. U.S. District Court*, *supra*, 698 F.2d at 971-972 & n.2 (9th Cir. 1983) ("when admiralty claims are joined with civil claims and the issues cannot be segregated for separate trial, a jury trial if timely demanded is required").

Connecticut Bank's suggestion that the Ninth Circuit's decision is inconsistent with *McCrary v. Seatrain Lines, Inc.*, 469 F.2d 666, 668 (9th Cir. 1972) and *Emerson G.M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984) is mistaken. Although Connecticut Bank seizes on *obiter dicta* in those decisions, its attempt to manufacture a conflict between this case and prior decisions by the Ninth Circuit is disingenuous. *McCrary*

and *Emerson* hold that a Rule 9(h) designation by the pleader of a maritime claim precludes an opposing party from demanding a jury trial of the pleader's claim. Neither decision holds that a plaintiff's Rule 9(h) designation attaches to cross-claims, counterclaims, and third-party claims asserted by other litigants. Nor does either decision hold that a party is entitled to a non-jury trial of a maritime claim when the maritime claim is factually related to other claims triable to the jury as a matter of right.

Neither *McCrary* nor *Emerson* considered the issue before the Ninth Circuit in this case: whether Rule 9(h) may be invoked by one party to deny an opposing party a jury trial of the opposing party's claim against the former. Plainly, the Ninth Circuit's holding in this case, that a party's Rule 9(h) election attaches solely to the party's claims and does not abridge an opposing party's constitutional right to a jury trial of other properly joined claims, is not in conflict with *McCrary* or *Emerson*.

II.

THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS.

Nor is the Ninth Circuit's decision in conflict with the decision of any other Court of Appeals. Contrary to Connecticut Bank's assertion, the Ninth Circuit's decision is not inconsistent with the Fifth Circuit's decision in *Harrison v. Flota Mercante Grancolombia, S.A.*, 577 F.2d 968, 986 (5th Cir. 1978). *Harrison* does not stand for the proposition that a plaintiff's Rule 9(h) election precludes a jury trial of all claims asserted by other parties, as Connecticut Bank asserts. In *Harrison*, the Fifth Circuit held that a fourth party defendant was not entitled to demand a jury trial of the "product liability and negligent failure to warn" claim stated directly against it in the plaintiff's amended complaint, where the plaintiff's amended complaint identified the claim as one "within admiralty and maritime jurisdiction pursuant to Rule 9(h)". 577 F.2d 973 & 985 (5th Cir. 1978).

Contrary to Connecticut Bank's assertion, the Fifth Circuit did not consider whether the fourth party defendant was entitled to a jury trial of arguably non-maritime third and fourth party claims for indemnity. Because the District Court found the fourth party defendant solely liable to the plaintiff, it dismissed the

indemnity claims against the fourth party defendant and, hence, the fourth party's demand for a jury trial of those claims was not an issue on appeal and the Fifth Circuit had no occasion to consider whether the plaintiff's Rule 9(h) election precluded a jury trial, not only of the claims stated in the plaintiff's amended complaint, but in the third and fourth party complaints as well.

Harrison holds that the pleader is the master of his pleading, but no more. The pleader may designate his claim a maritime claim to be tried in admiralty without a jury. He may not, however, by his characterization of his claim, preempt the legal claim of another party or another party's constitutional right to a jury trial.

The other Fifth Circuit decisions cited by Connecticut Bank are likewise inapposite. In *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983) and *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir. 1975), plaintiffs were forced to non-jury trials when they identified their claims as maritime claims. Unlike this case, however, the only claims asserted in *T.N.T. Marine* and *Romero* were maritime claims; no party there asserted a claim "at law", as the MM&P has here. These cases, therefore, hardly hold, as Connecticut Bank asserts, that a Rule 9(h) designation

by one party defeats another litigant's constitutional right to a jury trial of a claim at law.

In *Fisher v. Danos*, 671 F.2d 904 (5th Cir.), *cert. denied*, 459 U.S. 840 (1982), the Fifth Circuit held that a Rule 9(h) election to proceed non-jury was not waived by counsel's acquiescence in a pretrial order providing for a jury trial. Again, the only claim involved was a maritime claim. The decision does not hold that a plaintiff's Rule 9(h) designation defeats a defendant's Seventh Amendment right to a jury trial of a legal counterclaim, as Connecticut Bank mistakenly asserts.

In short, the Ninth Circuit's decision does not conflict with the decision of any other Court of Appeals and is based upon a fair reading of Rule 9(h) and the Court's *Fitzgerald* and *Beacon Theatres* decisions. A fair reading of Rule 9(h) is that the power to make the election provided by the Rule belongs to the "pleader" of the "claim" and that the election is claim specific, not action preemptive. Likewise, the Court has squarely held that there is no right to a non-jury trial in admiralty and that, where factually related issues are common to legal and non-legal claims, all claims must be submitted to the

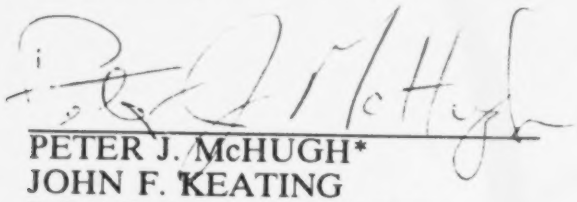
jury. Given that the Ninth Circuit's decision so holds, no further review is merited.

CONCLUSION

The day in which "proctors" filed "libels" on the "admiralty side" of the Court in accordance with the Admiralty Rules is no more. Since the merger of law and admiralty, the Federal Rules have permitted the assertion of maritime and non-maritime claims in one civil action, thereby providing the economies of a single court for disposition of complex modern disputes. Given that the Ninth Circuit's decision preserves the Seventh Amendment right to trial by jury after the merger, no further review is merited.

For the foregoing reasons, respondents respectfully submit that the petition for certiorari in Docket No. 91-1282 should be denied.

Respectfully submitted,



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